No. — 243

In the Supreme Court of the United States

October Term, 1939

Guy T. Helvering, Commissioner of Internal Revenue, petitioner

v.

F. W. Fitch

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INDEX

CITATIONS

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v.

F. W. FITCH

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit, entered in the above-entitled cause on April 25, 1939, reversing a decision of the Board of Tax Appeals and remanding for further proceedings in conformity with its opinion.

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 10-13) is unreported. The opinion of the Circuit Court of Appeals is reported in 103 F. (2d) 702.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 2~~5~~3, 1939. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether payments made to the respondent's divorced wife from the income of a trust which was created by him for her maintenance and support and which was ratified in the divorce decree should be included in respondent's taxable income, even if the state court lacked power to award further alimony.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in Appendix A, *infra*, pp. 16–17.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 10–12) and stipulated by the parties (R. 19–61) are substantially as follows:

Taxpayer, a resident of Des Moines, Iowa, is the divorced husband of Lettie S. Fitch, to whom he was married in 1892. They lived together as husband and wife until 1917, and had four children. In that year they separated. In 1919, taxpayer purchased a home for his wife, at a cost of $5,000, furnished it for her, and gave her an automobile. In the same year the F. W. Fitch Company was

incorporated, and acquired the assets of a predecessor partnership in exchange for 2,000 of its shares. Of these shares 1,860 were issued to taxpayer and 10 to his wife, who was elected vice president and a director of the corporation; and by reason of taxpayer's control, she received from it $300 a month although she had no regular hours of employment and did not devote much time to its affairs. (R. 10.)

On December 27, 1922, Lettie S. Fitch filed a suit for separate maintenance against taxpayer in the District Court of Polk County, Iowa. This suit was dismissed on April 7, 1923, after the parties had agreed upon a settlement. In accordance with the settlement, taxpayer leased certain premises, owned by him, to the F. W. Fitch Company for 99 years at an annual rental of $12,000, and on April 23, 1923, joined his wife and the Bankers Trust Company as trustee in the execution of a trust agreement, under which the lease was transferred to the trustee to hold title, collect the rents, and after the deduction of expenses to pay to Lettie S. Fitch $600 a month during her life and the remainder to taxpayer during his life. Provision was made further for the trust's duration for at least 15 years and for distribution of the income to the children of taxpayer and his wife in case either should die prior to the termination of the minimum period. Upon creation of this trust, the terms of which have been and are now being substantially complied with, the wife ceased to be an officer and

director of the F. W. Fitch Company, and received no further payments from it. (R. 10–11.)

On April 14, 1925, Lettie S. Fitch filed a suit for divorce against taxpayer in the District Court of Polk County, Iowa, alleging cruelty, desertion, and failure to provide for her and a minor child in a proper manner, and praying for the custody of the child, the only one then a minor, and for a money judgment against taxpayer. In his answer taxpayer alleged, *inter alia*, that he had created the above trust for her benefit in settlement of the prior suit for maintenance; that (R. 11):

> * * * She is now and was receiving this $600.00 per month at the time she filed her petition herein, claiming that the defendant had failed to provide for her and for the minor child in a proper manner. * * *

and that (R. 11):

> This constituted and now constitutes a full and complete settlement and gives to the plaintiff an amount in excess of what she is in equity entitled to, and the plaintiff, at the time orally agreed with the defendant that the amount given her was sufficient for all time, and that plaintiff and defendant should go their respective ways without interference with each other.

On December 17, 1925, the court entered a decree finding (R. 59)—

> that the plaintiff is entitled to the relief prayed for in her petition as against Fred W. Fitch, and is entitled to an absolute di-

> vorce, and is entitled to the property and alimony settlement.

The decree granted the wife an absolute divorce and the custody of the minor son and further provided (R. 11–12):

> * * * that the trust agreement which is referred to in the defendant's answer * * * be, and the same is hereby ratified and confirmed by the court; and that the property and alimony settlement made by the parties be, and it is hereby confirmed by the court.

Pursuant to this decree taxpayer transferred to Lettie S. Fitch 600 common shares of the F. W. Fitch Company, which on December 31, 1925, had a book value of $77,959.80 and paid to her attorney the sum of $23,500, of which she received $8,500 and the balance represented counsel fees and expenses (R. 12).

During 1933 the trustee under the trust of April 23, 1923, distributed to Lettie S. Fitch $7,128, which the Commissioner included in taxpayer's taxable income (R. 12).

The Board held the doctrine of *Douglas* v. *Willcutts*, 296 U. S. 1, applicable, upheld the Commissioner, and found a deficiency in tax of $1,555.58 (R. 13). Upon appeal, the Circuit Court of Appeals, one judge dissenting, held the case of *Douglas* v. *Willcutts* distinguishable, and ordered that the decision of the Board of Tax Appeals be reversed and the cause remanded.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In excluding from the gross income of the respondent income paid to his divorced wife pursuant to the provisions of a trust established by respondent for her maintenance and support, which trust was ratified and confirmed in a divorce decree.

(2) In failing to hold respondent taxable under the doctrine of *Douglas* v. *Willcutts*, 296 U. S. 1, upon the said income, as income paid out to his wife under a trust created by him to discharge his legal obligation to support her.

(3) In holding that the considerations that the alimony trust may not, subsequent to the divorce decree, be modified by the state court and that the settlor has not agreed to make up deficiencies in the income render the doctrine of *Douglas* v. *Willcutts* inapplicable.

(4) In failing to hold that the Iowa courts have power to award further alimony against respondent.

(5) In failing to affirm the decision of the Board of Tax Appeals, and in reversing that decision and remanding the cause.

REASONS FOR GRANTING THE WRIT

1. The decision below fails correctly to apply the principle stated in *Douglas* v. *Willcuts*, 296 U. S. 1. In that case, in a decree of divorce, the Minnesota court adopted a provision agreed to by the parties

whereby the husband conveyed to a trustee certain securities from the income of which the wife, during her lifetime, was to receive annual payments in full settlement of alimony and dower rights and in lieu of claims for maintenance and support. This Court held that the trust agreement was made a part of the state court's decree of alimony, that the taxpayer had an obligation under the decree "to devote the income in question, through the medium of the trust, to the use of his divorced wife," and that the income was included within the taxpayer's gross income, under the broad definition of Section 22, since (p. 9):

> In the present case, the net income of the trust fund, which was paid to the wife under the decree, stands substantially on the same footing as though he had received the income personally and had been required by the decree to make the payment directly.

The instant case presents an almost identical situation. Respondent conveyed to a trustee certain property for a term of fifteen years, from the income of which, during her lifetime, his wife was to receive payment of $600 per month. The trust was established, in settlement of a suit for separate maintenance, for her maintenance and support. And in the present case there was also approval of the trust by the divorce court, although this element was not essential to the decision in *Douglas* v. *Willcutts* (see *Helvering* v. *Coxey*, 297 U. S. 694, reversing 79 F. (2d) 661 (C. C. A. 3d)). In

granting the divorce the state court, which could have made further provision for the support of the wife as prayed in her complaint,[1] was apparently convinced by the taxpayer's answer as to the sufficiency of the amounts payable to his wife under the trust (R. 51, 54–55; 11). In its decree, the court (R. 59–60; 11–12) recited that the parties had "entered into an agreement of settlement of all of their property matters and alimony without the aid of the court," found the plaintiff entitled to a divorce and "entitled to the property and alimony settlement," and decreed—

> * * * that the trust agreement which is referred to in the defendant's answer * * * be, and the same is hereby ratified and confirmed by the court; and that the property and alimony settlement made by the parties be, and it is hereby confirmed by the court.

To paraphrase the opinion in *Douglas* v. *Willcutts*, it seems clear that the decree confirms and embodies respondent's obligation to devote the income in question, through the medium of the trust, to the use of his wife, and that the income stands substantially on the same footing as though respondent had received the income personally and been required by the decree to make the payment directly. As Circuit Judge Woodrough said in his note of dissent, the case of *Douglas* v. *Willcuts* required the court below to affirm.

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[1] Iowa Code 1935, Sec. 10481, *infra*, Appendix A.

The court below distinguished *Douglas* v. *Willcutts* as follows:

> In the *Douglas* case, the legal liability to his wife continued throughout the tax year because he expressly agreed that if the trust income should fall below $15,000.00 in any year, he would make up the deficiency, and the divorce decree confirmed that liability. In addition to this, the law of Minnesota continued his liability for the support of his divorced wife and vested a continuing jurisdiction in the courts to supervise and revise both the decree and the trust agreement to that end.

We submit that the court emphasized elements not crucial to the result in *Douglas* v. *Willcutts*. It is true that in reciting the facts this Court did state that deficiencies in the trust income up to a certain amount were to be made up in a prescribed manner (296 U. S. at 3). And this Court did make reference to the power of the Minnesota court to revise its original divorce decree (296 U. S. at 6-7), in the course of a general discussion of the state law establishing the conclusion that the trust was not related solely to the contract of the parties, but was created in discharge of a legal obligation imposed by a court not bound by the trust agreement. But these considerations do not necessarily limit the doctrine of the case.

We may assume, for purposes of argument, that subsequent to the divorce decree the state court could not order respondent to make additional pay-

ments to his wife.[2] It suffices, to show the applicability of *Douglas* v. *Willcutts,* that the trust was established as a means of carrying out the obligation of the taxpayer, whether or not that obligation can be increased. Although under Iowa law a man is under no general duty to support a divorced wife it is plain enough that the court decreeing the divorce may determine upon an obligation of future maintenance and make an appropriate order. *Spain* v. *Spain,* 177 Iowa 249. Where a court determines that the income from a specified trust established by the husband is adequate provision for such maintenance, the subsequent application of that income carries out that obligation, and is taxable to the husband. It is no less his obligation because, after devoting an income well in excess of the obligated payments to their discharge, he is under no duty to make good any hypothetical deficiency. Nor is such taxation precluded by the general doctrine that a transfer of income from a trust is equivalent to a conveyance

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[2] If certiorari is granted, we shall present an alternative argument disputing this proposition of state law. Under Iowa Code, sec. 10481, when a divorce is decreed the court may make such order in relation to the property and maintenance of the parties as shall be right, and may make subsequent changes when circumstances render them expedient. Even if the confirmation of the trust is regarded as equivalent to a lump-sum award of alimony, it is not settled that the divorce court may not order further payment. Cf. *McNary* v. *McNary*, 206 Iowa 942, 945; *Goldsberry* v. *Goldsberry*, 217 Iowa 750; *Handsaker* v. *Hanksaker*, 223 Iowa 462.

of property, rendering future income taxable to the transferee. In *Blair* v. *Commissioner,* 300 U. S. 5, the Court expressly put to one side cases such as *Douglas* v. *Willcutts,* as turning upon the application of the income to the discharge of the taxpayer's obligation (see 300 U. S. at 11).

2. This petition should be granted in view of the uncertainty and diversity in the reception by the lower courts of the opinion in *Douglas* v. *Willcutts.* The court below followed the decision in *Commissioner* v. *Tuttle,* 89 F. (2d) 112 (C. C. A. 6th), where the court held the taxpayer not taxable on income paid to his former wife upon a trust created by him during the pendency of divorce proceedings, upon the ground that the trust represented a property settlement, that under state law the Michigan courts could not increase the payments made by the husband. That decision distinguished *Douglas* v. *Willcutts* as involving a trust wherein the grantor agreed to make up deficiencies in the trust income, and as arising in a state whose courts had continuing power to revise the allowance to the wife. This decision was then in probable conflict with the principle stated in *Helvering* v. *Brooks,* 82 F. (2d) 173 (C. C. A. 2d), followed in *Commissioner* v. *Hyde,* 82 F. (2d) 174 (C. C. A. 2d), where the court stated that there was no substance in a distinction asserted between an agreement to pay alimony and an agreement for the settlement of property rights between husband and wife.

No cognizance was taken of the doctrine evolved in the *Tuttle* case in other cases holding a husband taxable upon income paid to a divorced wife under a trust created to satisfy the obligation of the husband to support and maintain his wife. *Alsop* v. *Commissioner,* 92 F. (2d) 148 (C. C. A. 3d), certiorari denied, 302 U. S. 767, rehearing denied, 303 U. S. 666; *Glendinning* v. *Commissioner,* 97 F. (2d) 51 (C. C. A. 3d); *Donnelley* v. *Commissioner,* 101 F. (2d) 879 (C. C. A. 7th), certiorari denied, June 5, 1939, No. 938, October Term, 1938. In the *Alsop* case the court pointed out that the husband had to meet the question of discharging his obligation to support his wife, and that alimony paid would have been taxable to him, and continued (p. 149):

> He could have discharged his obligation by paying her a stipulated sum, but he did not do this. He chose rather to take the chance of forever relieving himself of the obligation to support her by the creation of a trust which with its provisions stood in the place of his obligation.

And in *Glendinning* v. *Commissioner, supra,* the court held the husband taxable upon income paid to his divorced wife from a trust created, as a substitute for a court order requiring payment to his then wife, prior to the divorce decree. It said (p. 51):

> Under the law of Pennsylvania this taxpayer was under no legal obligation to pay his divorced wife anything by way of alimony or otherwise. The law however permits and

> upholds an agreement by the husband to pay. There is then an obligation, not imposed by law, but self imposed, to pay.

Recently, however, the Circuit Court of Appeals for the Second Circuit expressly overruled its opinion in the *Brooks* case and followed the decisions in the *Tuttle* case and the instant case. *Commissioner* v. *Leonard*, and *Fuller* v. *Commissioner*, decided June 30, 1939, reprinted *infra*, Appendix B, pp. 18–25. The court stated that it had at first failed correctly to interpret the decision in *Douglas* v. *Willcutts*. We intend to petition for certiorari in these cases.

Technically, the court decisions are distinguishable upon their facts.[3] *Helvering* v. *Coxey*, 297 U. S. 694, reversing 79 F. (2d) 661 (C. C. A. 3d), upholding taxation of the husband upon the income from a trust not referred to in the divorce decree, arose in New Jersey where the extent of the husband's liability to the divorced wife may be continually reexamined by the courts. See, also, *Commissioner* v. *Hyde*, *supra*, 175. Provisions of the trust requiring the husband to make up deficiencies in the trust income to a certain amount are found in the reports of the *Hyde* case (p. 175), the *Alsop* case (p. 148), and *Donnelley* case (p. 879). A similar provision is found in the record in the *Glendin-*

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[3] It was because the facts made the application of *Douglas* v. *Willcutts* indisputable, and because the application of the doctrine of the *Tuttle* case would not have changed the result, that the Government opposed the petitions for certiorari in the *Alsop* case and *Donnelley* case.

ning case, but not in the opinion of the court. However, the technically distinguishing facts, not even noted in the *Glendinning* case nor made part of the reasoning in the other cases, do not negate the substantial conflict in principle.[4] The courts which decided the *Brooks, Hyde, Alsop,* and *Glendinning* cases seem plainly to have meant their opinions to stand for more than the facts before them, and would have affirmed the Board in the present case. In the *Leonard* case the court felt required to overrule its decision in the *Brooks* case. After noting that the Brooks case might be distinguished upon the basis of Florida law, the court said: "But we had nothing of the sort in mind, and the decision stands for more." It seems a matter of importance that this Court determine whether the decisions just mentioned or the *Tuttle* line of cases correctly interpret the doctrine of *Douglas* v. *Willcutts*.

3. Further indication of the importance of the present case is indicated by the volume of litigation involving the question. The Bureau of Internal Revenue advises that in the New York and Chicago offices of the Bureau there are pending 26 cases, involving 43 tax years, and taxes in excess of $411,-000, and that in the Income Tax Unit in Washing-

[4] The Board of Tax Appeals regards the *Tuttle* case as inconsistent with the *Brooks* and *Coxey* cases. *Goldring* v. *Commissioner*, 36 B. T. A. 779, 785; *Metcalf* v. *Commissioner*, 40 B. T. A. —, No. 34.

ton there are 10 cases, involving 24 tax years, with an undisclosed total amount of taxes. The question is pending before the Board of Tax Appeals in nineteen cases, involving $234,000. In this connection, it may be noted that on June 30, 1939, the Board stated (*Metcalf* v. *Commissioner*, 40 B. T. A. —, No. 34):

> *Fitch* v. *Commissioner* * * * is directly contrary to the result we reach here. * * * Despite our respect for that tribunal, we find ourselves unable to follow the reasoning of the Fitch case.

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

Golden W. Bell,
Acting Solicitor General.

July 1939.

APPENDIX A

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 22. GROSS INCOME.

(a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits, and income derived from any source whatever. * * *

* * * * *

SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) *General rule.*—In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses;

* * * * *

Treasury Regulations 77, promulgated under the Revenue Act of 1932:

ART. 83. *Gifts and bequests.*—Property received as a gift, or received under a will or under statutes of descent and distribution, is exempt from the income tax, although the income therefrom derived from investment, sale, or otherwise is not. An amount of principal paid under a marriage settlement

is a gift. Neither alimony nor an allowance based on a separation agreement is taxable income. (See article 281.)

ART. 281. *Personal and family expenses.*— * * * Alimony and an allowance paid under a separation agreement are not deductible from gross income. * * *

Code of Iowa, 1935:

SEC. 10480. *Showing.*—In making such orders [relating to attachment], the court or judge shall take into consideration the age and sex of the plaintiff, the physical and pecuniary condition of the parties, and such other matters as are pertinent, which may be shown by affidavits, in addition to the pleadings or otherwise, as the court or judge may direct. [C73, Sec. 2228; C97, Sec. 3179; C24, 27, 31, Sec. 10480.]

SEC. 10481. *Alimony—custody of children—changes.*—When a divorce is decreed, the court may make such order in relation to the children, property, parties, and the maintenance of the parties as shall be right.

Subsequent changes may be made by it in these respects when circumstances render them expedient. [C51, Sec. 1485; R60, Sec. 2537; C73, Sec. 2229; C97, Sec. 3180; C24, 27, 31, Sec. 10481.]

(The above provisions were part of the Iowa law at the time the divorce was granted in this case in 1925 and have remained the same since that time.)

APPENDIX B

United States Circuit Court of Appeals for the Second Circuit. Guy T. Helvering, Commissioner of Internal Revenue, petitioner, against Stephen J. Leonard, respondent. Stephen J. Leonard, petitioner, against Guy T. Helvering, Commissioner of Internal Revenue, respondent. Before: L. Hand, Swan & Augustus N. Hand, circuit judges

On separate petitions by the Commissioner of Internal Revenue and the taxpayer to review an order of the Board of Tax Appeals, affirming in part and reversing in part, a deficiency assessed against the taxpayer for income taxes for the year 1929.

J. Donald Duncan for Leonard.

L. W. Post for Helvering, Commissioner.

L. Hand, Circuit Judge:

This case comes up upon appeals by the Commissioner and the taxpayer from an order of the Board of Tax Appeals, assessing a deficiency against the taxpayer for the year 1929. The facts are as follows: On December 27, 1928, the wife of Leonard, the taxpayer, who was already living apart from him, began a suit for divorce against him in New York. While this was pending, the spouses executed two instruments, a deed of trust and a separation agreement, both on June 4, 1929. The deed conveyed property worth about $650,000

to a trustee, which was to pay $5,000 annually to each of the couple's three children, and the remainder of the income to the wife; the other provisions of the deed are not relevant to this controversy. The separation agreement recited the deed and the expectation of both parties that the wife would receive an income of $15,000 from the trust and an equal sum from earlier gifts, so that she would have an invested income of $30,000 from all sources. To bring her total allowance for maintenance up to $65,000, Leonard promised to pay her $35,000 more, as a maximum, subject, however, to reduction to not less than $10,000, if he should later convince the divorce court that his means no longer justified any larger sum. In consideration of these provisions the wife agreed to assume all her living expenses, thus discharging the husband from his duty of support. The decree of divorce, which became absolute in October 22, 1929, incorporated the separation agreement, "approved and affirmed" it, and directed Leonard to pay his wife $35,000 "during the term of her natural life." Between June 4th and December 31, 1929, the trustee received income of $16,191.34 from the trust property, of which it distributed $5,200 to the wife, and five twelfths of $5,000—$2,083.33—to each of the three children, leaving an undistributed balance of income for that period of about $4,700. The Board assessed Leonard upon the income distributed to his wife and minor children on the theory that these payments were in discharge of his continuing marital and paternal duties, but refused to assess him upon the undistributed income. Both parties appealed.

So far as we have found, no case has ever arisen in which a husband has discharged his duty of

maintenance by the payment of a lump sum, but we are confident that in such a case any income, derived by the wife from the money received, would be assessed against her, regardless of the fact that the payment had relieved the husband pro tanto. Her income would be altogether beyond his control, its increase or decrease would not affect him at all, and it could be regarded as still his only by the most patent fiction. We see no difference, when, instead of a lump sum, the husband creates a trust in discharge of his duty; and in the only two cases where that situation has come before the courts, the income has been held to be taxable to the wife. *Commissioner* v. *Tuttle*, 89 Fed. (2) 112 (C. C. A. 6); *Fitch* v. *Commissioner*, 103 Fed. (2) 702 (C. C. A. 8). On the other hand such trusts will be only security if the husband's duty continues after decree, because the law or the decree reserves power to the divorce court to change its original award. *Douglas* v. *Willcutts*, 296 U. S. 1, was such a case. The spouses lived in Minnesota, by whose law the divorce court, not only was not bound by any agreement between them, but—and this was the critical fact—might later change the original allowance, if circumstances made it desirable. That was true also of *Helvering* v. *Coxey*, 298 U. S. 694, where the spouses lived in New Jersey, in which a settlement, though made with the wife's concurrence, does not end the power of the divorce court. *Greenberg* v. *Greenberg*, 99 N. J. Eq. 461. The question therefore is whether a decree in the state of the divorce terminates the husband's duty and substitutes finally the provisions which it incorporates. In New York §§ 1155 & 1170 of the Civil Practice Act do indeed give the divorce court

power to change allowances fixed in the original decree; and §. 51 of the Domestic Relations Law forbids a wife's making an agreement discharging her husband's duty to support her. Nevertheless, a settlement made in discharge of the husband's duty is finally binding upon the parties to the divorce, if incorporated into the decree; and its terms will not be changed, unless the wife can disaffirm it for fraud, overreaching, or the like. *Galusha* v. *Galusha*, 116 N. Y. 635; S. C. 138 N. Y. 272; *Cain* v. *Cain*, 188 App. Div. 780; *Hamlin* v. *Hamlin*, 224 App. Div. 168. *Kunker* v. *Kunker*, 230 App. Div. 641, seems an exception to this doctrine, though it is not entirely clear on just what grounds the majority did proceed. If they meant to hold that the agreement, though unimpeached, is not conclusive, the decision seems to us at variance with the law as previously laid down.

In the case at bar, if the trust had been the only consideration for the discharge of Leonard's duty, the income would not, therefore, have been taxable to him: his liability would have ended with the decree, which the court could not have reopened, and the case would have fallen within *Commissioner* v. *Tuttle*, *supra*, and *Fitch* v. *Commissioner*, *supra*. The situation was not, however, quite as simple as that, for the settlement agreement added to the trust a promise to pay alimony which the court might change and fix between \$10,000 and \$35,000. The question therefore becomes whether this changed the trust into a partial security for a total allowance, made up of the present income of the trust and of so much as the court might from time to time allow, and whether this control over it brings the situation within *Douglas* v. *Willcutts*, *supra*.

We think it did not. It seems to us that the intent was that Leonard should never be obliged to make good any deficits caused by decrease in the trust income, or to be relieved by its increase; the original income was taken as the equivalent of a maintenance of $15,000, and discharged him pro tanto. That is the more natural view. Possibly, however, there may be an indirect relation between the trust income and the amount fixed in the future by the divorce court under the separation agreement. It is true that the agreement apparently makes the only test the husband's "circumstances and ability to pay," but that does not necessarily mean that nothing else will be considered. It may be that the wife's other means will also be deemed a factor, and in this way the income of the trust indirectly will determine the allowance. But that circumstance alone is not enough to make that income taxable to him; for if it were, the income from the earlier gifts would be similarly taxable, because that too was a factor in the original settlement. Moreover, consistently we should have to go a step farther, for it is the commoner practice in fixing alimony to take into consideration the wife's independent income from all sources. *Sullivan* v. *Sullivan*, 170 Mich. 557; *Dietrick* v. *Dietrick*, 88 N. J. Eq. 560. Obviously it would be absurd to tax the husband upon all this income, and it follows that a more direct correspondence is necessary than anything arising from the power reserved in the decree, even if, as we are disposed not to believe, the income of the trust was not for all purposes to be deemed an equivalent of $15,000.

We conclude therefore that the Board was wrong in assessing the husband for that part of the in-

come payable to the wife. In so holding, it seems to us that our decision in *Helvering* v. *Brooks,* 82 Fed. (2) 173, must be overruled. There we held that the income from a trust made in settlement with a wife, who was suing for divorce, was taxable to the husband. It is said that by the law of Florida—the place of the divorce—the divorce court had power later to change the allowance, as fixed in the settlement, to correspond with changes in the husband's means; and perhaps that was so. But we had nothing of the sort in mind, and the decision stands for more. *Douglas* v. *Willcutts, supra* (296 U. S. 1) was then new, and we assumed too readily—as we now think—that any income which in fact relieved the husband from alimony was to be regarded as still his. We failed to consider how carefully the opinion in that case had been based upon the Minnesota law, which continued the husband's duty, and in effect made the trust only a security for whatever the divorce court might from time to time allow. We are satisfied that the Supreme Court did not mean to extend the doctrine to situations where the husband's duty is at an end, and to assess him upon income over which he has no control, and in which he has no interest.

The same considerations do not apply to the income of the trust payable to the minor children. Pro tanto the trust was created in performance of Leonard's paternal duty of support, which he could neither commute nor discharge. The payments for 1929 seem to have been calculated on the assumption that nothing was due before August first. The settlement agreement fixed the first of the month next succeeding the date of execution as the "settlement date," but that would appear to have

been July first, and in any event the provision does not seem to apply to the deed of trust. The proper date would seem to be that on which the deed took effect; but the children were entitled only to that proportion of $5,000 which the remaining months bore to the twelve months. The tax will be assessed upon so much as was payable to the minor children so calculated; and the remainder of the deficiency will be expunged.

Order reversed; cause remanded.

United States Circuit Court of Appeals for the Second Circuit. Alfred C. Fuller, petitioner, against Guy T. Helvering, Commissioner of Internal Revenue, respondent. Before: L. Hand, Swan & Augustus N. Hand, circuit judges

On petition to review an order of the Board of Tax Appeals assessing a taxpayer upon his income for the years 1931, 1932, and 1933.

John C. Parsons for the petitioner.

L. W. Post for Helvering, Commissioner.

William D. Mitchell, amicus curiae.

Per curiam:

This case differs from *Helvering* v. *Leonard*, handed down herewith, only in that the divorce was granted in Nevada, and the trust was in full discharge of the husband's duty to support the wife. Under the law of Nevada a settlement of the kind here in question does not conclude the divorce court as to the wife's allowance, but the allowance once made is final (*Sweeney* v. *Sweeney*, 42 Nev. 431) unless the decree reserves power to the divorce court to modify it. *Lewis* v. *Lewis*, 53 Nev. 398; *Asltine* v. *Second Judicial District Court*, 62 Pac.

Rep. (2) 701. The decree of divorce contained no such reservation in the case at bar, and the settlement was a final discharge. The income from the trust was therefore taxable only to the wife.

Order reversed; deficiencies expunged.

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